IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Messody Perlberger, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
Norman Perlberger, et al.	:	NO. 97-4105

M E M O R A N D U M

Padova, J. February , 1999

Plaintiffs Messody J. Perlberger and her adult daughter Karen D. Perlberger ("Plaintiffs") have alleged the existence of a fraudulent scheme to conceal the true value of the income of Defendant Norman Perlberger ("Perlberger") during Messody and Norman Perlberger's divorce proceedings.[1] Plaintiffs allege violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.A. §§ 1961-68 (West 1984 & Supp. 1997), by use of mail and wire fraud, in violation of 18 U.S.C.A. §§ 1341

[1]Allen L. Rothenberg, Amy S. Lundy Brennen, G. Daniel Jones, and Jones Hayward & Lenzi, P.C. were originally named as Defendants by Plaintiffs. The Court granted summary judgment in favor of these Defendants. Perlberger v. Perlberger, Civ.A.No. 97-4105, 1998 WL 964182 (E.D. Pa. Nov. 4, 1998); Perlberger v. Perlberger, Civ.A.No. 97-4105, 1998 WL 937270 (E.D. Pa. Nov. 23, 1998); Perlberger v. Perlberger, Civ.A.No. 97-4105, Slip Op. (E.D. Pa. Nov. 30, 1998)(supplementing and amending the Nov. 4, 1998 and Nov. 23, 1998 Memoranda and Orders to grant summary judgment only as pertaining to Plaintiffs Messody and Karen Perlberger, not the minor child, Laura E. Perlberger). The Court later dismissed Laura E. Perlberger as a Plaintiff in this action because she is a minor and was not represented by counsel. See 1/6/99 Order.

and 1343 (West 1984 & Supp. 1997). Plaintiffs also bring claims based in state law for fraud and intentional infliction of emotional distress.[2]

Before the Court is a Motion for Summary Judgment filed by Defendants Norman Perlberger and his law firm, Perlberger Law Associates, P.C. ("PLA") (collectively referred to as the "Attorney Defendants"). For the reasons set forth below, the Court will deny the Motion.

I. FACTUAL BACKGROUND

The Court has written extensively on this case. A detailed factual and procedural history of the case is set forth in the Court's prior opinions. Perlberger v. Perlberger, Civ.A.No. 97-4105, 1997 WL 597955 (E.D. Pa. Sept. 16, 1997); Perlberger v. Perlberger, Civ.A.No. 97-4105, 1998 WL 76310 (E.D. Pa. Feb. 24, 1998); Perlberger v. Perlberger, Civ.A.No. 97-4105, 1998 WL 472657 (E.D. Pa. Aug. 13, 1998); Perlberger v. Perlberger, Civ.A.No. 97-4105, 1998 WL 964182 (E.D. Pa. Nov. 4, 1998); Perlberger v. Perlberger, Civ.A.No. 97-4105, 1998 WL 937270 (E.D. Pa. Nov. 23, 1998); Perlberger v. Perlberger, Civ.A.No. 97-4105, Slip Op. (E.D. Pa. Nov. 30, 1998).

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[2]By Order filed on September 18, 1997, the Court dismissed Count II (Civil Conspiracy, 18 U.S.C.A. §§ 1985 and 1986), Count IV (Violation of the Federal Family Support Act of 1988, 42 U.S.C.A. § 601), and Count V (Violation of the First and Fourteenth Amendments).

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A factual dispute is "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, “the adverse party’s response . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e). That

is, summary judgment is appropriate if the nonmoving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S. Ct. at 2552. Under Rule 56, the Court must view the evidence presented in the light most favorable to the party opposing the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513.

III. DISCUSSION

In their Motion, the Attorney Defendants seek summary judgment on the following grounds: (1) Perlberger and PLA cannot form a distinct enterprise within the meaning of 18 U.S.C. § 1961(c); (2) the alleged racketeering acts committed prior to October 1991 are time-barred; (3) there is no nexus between the alleged RICO conduct and the alleged harm suffered by Plaintiffs; (4) deference must be given to pending state court proceedings concerning the amount of child support and alimony from June 1997 to the present; and (5) the state law claims are barred under the doctrines of res judicata and collateral estoppel. The Court will address each of these arguments in turn.

A. RICO Enterprise

The Attorney Defendants move for summary judgment on the

basis that Plaintiffs have failed to satisfy the distinctiveness requirement for their Section 1962(c) claim requiring conduct by defendant "persons" acting through an "enterprise." Their argument is based on the fact that the Court has granted judgment in favor of the other Defendants as to claims brought by Plaintiffs Messody and Karen Perlberger. They contend that there is no separateness between Norman Perlberger and his law firm, PLA, of which Perlberger is the sole shareholder, and therefore "[t]here can be no RICO cause of action if the conspiracy, scheme and racketeering activity are limited, if at all, to the activities of Norman Perlberger by and through his law firm, Perlberger Law Associates, P.C." (Mot. at 10.) In other words, according to the Attorney Defendants, they cannot be both Defendant "persons" and the only members of the "enterprise" without violating the distinctive requirement of Section 1962(c).[3]

At this stage in the proceedings, the only Defendants remaining in the case are Norman Perlberger and PLA. They are "persons" for purposes of Plaintiffs' Section 1962(c) claim. 18

[3]In an earlier Motion to Dismiss, the Attorney Defendants urged the Court to dismiss Plaintiffs' RICO claim for failure to adequately allege a distinct enterprise. The Court found that Plaintiffs had alleged a distinct enterprise. Perlberger v. Perlberger, 1998 WL 76310, at *6. Although the Attorney Defendants raise the same argument in their Motion For Summary Judgment, the Court will entertain the Attorney Defendants' renewed argument because of the dismissal of the other named Defendants from this case.

U.S.C.A. § 1961(3) (West 1984)(a "person" includes any individual or entity capable of holding legal or beneficial interest in property). In order for Plaintiffs to state a viable Section 1962(c) claim, Norman Perlberger and PLA, the Defendant persons, must act through a distinct "enterprise." Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc., 46 F.3d 258, 268 (3d Cir. 1995). An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C.A. § 1961(4)(West 1984). Plaintiffs allege the existence of an enterprise consisting of the association-in-fact of all of the named Defendants. (Am. Count III at ¶¶ 103, 109, 115, 121.) Therefore, as pled, the enterprise now consists of Perlberger and PLA.

Because there is a complete overlap of the persons and the members of the enterprise, the Attorney Defendants argue that Plaintiffs have failed to satisfy the distinctiveness requirement. The Court disagrees. Consistent with the Court's previous ruling on the distinctiveness requirement, a complete overlap between the defendant persons and the members of an association-in-fact enterprise does not defeat the distinctivness requirement. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165-66 (3d Cir. 1989)(three corporate defendants, alleged to be persons under RICO, also together form an association-in-fact

enterprise). Although the enterprise is comprised of the named Defendants, it is separate and distinct from its constituent members. In other words, a distinct enterprise exists even when the very same persons named as Defendants constitute the association-in-fact enterprise.[4] See Miller v. Cohen, Civ.A.Nos. 93-5371 and 94-2700, 1996 WL 560525, at *3 n.8 (E.D. Pa. Sept. 30, 1996); Schuylkill Skyport Inn, Inc. v. Rich, Civ.A.No. 95-3128, 1996 WL 502280, at *31-31 (E.D. Pa. Aug.21, 1996); but see Kaiser v. Boyd, Civ.A.No. 96-6643, 1997 WL 476455, at *8-9 (E.D. Pa. Aug. 19, 1997). Consequently, the Court will deny the Attorney Defendants' Motion for Summary Judgment on this ground.[5]

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[4]Defendants also argue that because Norman Perlberger practices law through his law firm PLA and he is the only shareholder of PLA, the Court should treat the two Defendants as one and the same. This argument clearly fails. Unless Defendants are suggesting that PLA is a sham corporation, Perlberger and PLA are separate legal entities and are treated as such under the RICO statute. See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc., 46 F.3d at 268 (RICO's person-enterprise distinction can be satisfied by pleading corporate officer as person and corporation as enterprise).

[5]The Court reaches the same conclusion if the association-in-fact enterprise at issue in this case is given a more expansive interpretation. Although the pleadings defined the enterprise as consisting of the named Defendants, discovery has been conducted and completed in this case since the pleadings were filed. In their Opposition, Plaintiffs suggest that the enterprise consists of members other than the named Defendants, for example Norman Perlberger, Esquire, P.C., an entity that was operated by Norman Perlberger, and Diane Strausser. If the association-in-fact enterprise is construed to include Norman Perlberger, PLA, Strausser, and Norman Perlberger, Esquire, P.C., the distinctiveness requirement is clearly satisfied.

B. Statute of Limitations

Civil RICO claims are subject to a four year statute of limitations. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156, 107 S. Ct. 2759 (1987). The Attorney Defendants argue that the statute of limitations has run on Plaintiffs' RICO claim and summary judgment should be entered in their favor because the claim is untimely as a matter of law.[6]

In advancing this argument, the Attorney Defendants ignore the fact that Plaintiff Karen Perlberger's RICO claim did not accrue until she turned 18 years of age. 42 Pa.C.S.A. § 5533 (West Supp. 1998). Because she turned 18 after this case was filed, her RICO claim is clearly not time-barred. Therefore, the issue before the Court is whether Plaintiff Messody Perlberger's RICO claim is time-barred.

Under the "injury plus pattern" discovery rule followed by the United States Court of Appeals for the Third Circuit ("Third Circuit"), the statute of limitations for a civil RICO claim runs from the date the plaintiff knew or should have known that the

[6]The Attorney Defendants previously raised this issue in their second Motion to Dismiss. For the purposes of analyzing the Motion to Dismiss, the Court accepted as true the allegations in Plaintiffs' complaint that the fraudulent scheme was not discovered until 1996 and found that Plaintiffs' RICO claim was filed within the applicable four year limitations period. Perlberger v. Perlberger, 1998 WL 76310, at *5 (E.D. Pa. Feb. 24, 1998).

elements of a civil RICO cause of action existed. Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130 (3d Cir. 1988); Klehr v. A.O. Smith Corp., 521 U.S. 179, 117 S. Ct. 1984, 1992 (1997); Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 655 (3d Cir. 1998)(applying injury plus pattern discovery rule after Klehr). The elements of a RICO cause of action are the (1) conducting of (2) an enterprise (3) through a pattern of (4) racketeering activity. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985). For a private plaintiff, an additional element, injury to the plaintiff's business or property, is also required. Id. The Third Circuit has made clear that in determining whether the statute of limitations has run on a RICO claim, the plaintiff's "awareness that each element comprising a RICO claim is present is crucial." Keystone Ins. Co. v. Houghton, 863 F.2d at 1128. Therefore, to assess when Plaintiff Messody Perlberger's RICO claim accrued and the statute of limitations began to run, the Court must determine when she discovered or should have discovered that the Defendants had possibly engaged in conduct constituting the alleged pattern of racketeering and that this conduct had possibly caused her injury. Forbes v. Eagleson, 19 F.Supp.2d 352, 357 (E.D. Pa. 1998).

Plaintiff Messody Perlberger maintains that she first

learned of the fraudulent scheme perpetrated against her and her children in 1996 when she discovered the court file in Diane Strausser v. Norman Perlberger, et al., Case No. 92-18833, Court of Common Pleas of Montgomery County. (Pls.' Opp., Messody Perlberger Aff. at ¶ 3.) The Attorney Defendants do not dispute her representation that she made this discovery in 1996. Rather, they argue that she "knew or had reason to know all of the 'facts' necessary to have brought a RICO case" in 1991, during her divorce litigation in state court. (Mot. at 12.) In particular, they maintain that her divorce counsel advanced the position that Perlberger was using Diane Strausser as a conduit to fraudulently conceal Perlberger's assets and true income from Plaintiffs and the divorce court. (Id. at 11.) In support of their argument, the Attorney Defendants have attached copies of portions of the record from the divorce proceedings. (Exs. in Supp. of Attorney Defts.' Summ. J. Mot. ("Defts.' Exs.") Ex. 4.)

A review of these exhibits reveal that Messody Perlberger's counsel suspected and argued that Perlberger was using Strausser as a conduit to hide assets and income. In fact, these exhibits evidence reasonable diligence on the part of Plaintiff and her counsel to discover the nature and extent of the alleged fraudulent scheme. Klehr v. A.O. Smith Corp., 117 S. Ct. at 1993. It does not necessarily follow from these exhibits,

however, that, as a matter of law, Messody Perlberger knew or should have known in 1991 of the existence of the required elements of her RICO claim.

A key part of the alleged RICO scheme that the Attorney Defendants fail to mention is that during the Perlbergers' divorce proceedings, Strausser was allegedly an active participant in the scheme by aligning herself squarely with Perlberger and thwarting Plaintiff's discovery efforts. (Pls.' Exs. in Supp. of Opp.) Moreover, Perlberger and Strausser allegedly conspired to conceal Perlberger's income and to hide relevant information during discovery in the divorce proceedings. (Id.) As a consequence, although Plaintiff and her counsel may have suspected that Strausser was acting as a conduit, without Strausser's testimony to that effect, they were unable to secure direct evidence to support their belief that funds were diverted by Perlberger through Strausser. It was only after the conclusion of Perlbergers' divorce proceedings and the parting of Perlberger and Strausser that Strausser changed her testimony and revealed the existence of the alleged scheme to defraud Plaintiffs. It is this information that Messody Perlberger discovered in 1996 in the court file of the law suit Strausser filed against Perlberger.

"[T]he applicability of the statute of limitations usually implicates factual questions as to when plaintiff discovered or

should have discovered the elements of the cause of action; accordingly, defendants bear a heavy burden in seeking to establish as a matter of law that the challenged claims are barred." Davis v. Grusemeyer, 996 F.2d 617, 623 n. 10 (3d Cir. 1993)(citation and quotation omitted). Based on the Rule 56 submissions, the Court finds that issues of material fact exist as to whether Plaintiff Messody Perlberger knew or should have known that the elements of a civil RICO cause of action existed in 1991, at the time of her divorce, or in 1996, when she discovered the court file in Strausser v. Perlberger. For these reasons, the Court will deny the Attorney Defendants' Motion for Summary Judgment on this ground.

C. Nexus between the RICO Conduct and Plaintiffs' Injury

The Attorney Defendants advance a somewhat confusing argument that they are entitled to summary judgment as a matter of law because Plaintiffs have failed to raise triable issues of fact that Defendants' conduct was the proximate cause of Plaintiffs' injury. The Attorney Defendants argue that Plaintiffs have failed to establish the required causal connection because during the period of 1992 to 1996, Plaintiffs never petitioned the state court for modification of the child support and alimony orders. (Mot. at 18-20, citing Eli Lilly and Co. v. Roussel Corp., 23 F.Supp.2d 460, 483 (D.N.J. 1998).)

According to the Attorney Defendants, because of this failure, Plaintiffs cannot argue that they have been the victims of understated income for the period of 1992 through 1996. (Id. at 21.)

The Court is unpersuaded by this argument. First, as the Court has stated many times before, Plaintiffs have filed a civil RICO action with pendent state law claims. Although the nature of the injury alleged by Plaintiffs relates to the state law divorce proceedings, this is a separate law suit based on this Court's federal question jurisdiction. The Attorney Defendants have cited to no authority, and the Court is not aware of any, that imposes on Plaintiffs the requirement of seeking redress in state court before pursuing their federal claim in this court.

Second, the Attorney Defendants' nexus argument falls far short of what is necessary to secure summary judgment. Plaintiffs have submitted Rule 56 submissions to support their contention that they did not discover the alleged racketeering activities of the Defendants until 1996. Viewing the evidence presented in the light most favorable to Plaintiffs, as the Court must, Plaintiffs were not in a position to seek modification of the child support and alimony orders issued by the state court during the period of 1992 to 1996. Therefore, the Court will not grant the Attorney Defendants' Motion for Summary Judgment on

this ground.[7]

D. Deference to State Court Proceedings

In prior Motions to Dismiss, the Attorney Defendants asked this Court not to exercise jurisdiction over this case in deference to the state court proceedings. To this end, the Attorney Defendants moved for the dismissal of this case on the grounds that the Court's jurisdiction is barred by the domestic relations exception to this Court's jurisdiction, that the Court lacked jurisdiction over this case under the Rooker-Feldman

[7]In a three-sentence footnote, the Attorney Defendants attempt to piggyback onto the summary judgment motions filed by the other Defendants. (Mot. at 20 n.3.) The Motions by the other Defendants were aimed at demonstrating the absence of material issues of fact to support their involvement in the alleged predicate acts of racketeering. The Court engaged in a painstaking analysis of the voluminous Rule 56 submissions filed in support of and in opposition to those Motions. The Court's analysis of these submissions was necessarily oriented towards the alleged involvement of the other Defendants in the purported scheme to defraud Plaintiffs. Because of the nature of the alleged fraudulent scheme and the pivotal role that the Attorney Defendants allegedly played in that scheme, the Court's findings as to the other Defendants do not automatically inure to the benefit of the Attorney Defendants. They are under an independent obligation to demonstrate their entitlement to summary judgment based on the absence of genuine issues as to any material facts concerning their involvement in the alleged fraudulent scheme. They have failed to do so. Despite this failure, the Court takes this opportunity to note that the Rule 56 submissions raise issues of material fact as to the involvement of the Attorney Defendants in the alleged fraudulent scheme, particularly with respect to the financial dealings between Perlberger and Strausser. (Pls.' Exs.) Therefore, to the extent that the Attorney Defendants seek summary judgment as to the factual underpinnings of Plaintiffs' RICO claim, the Court will deny the Motion for Summary Judgment on this ground.

doctrine, and that the Court should abstain from exercising jurisdiction over this case pursuant to Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971) and Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S. Ct. 1236 (1976). In each instance, the Court denied Defendants' argument that this Court should show deference to the state court proceedings. Id. at *2; Perlberger v. Perlberger, 1998 WL 472657 (E.D. Pa. Aug. 13, 1998).

In their Motion for Summary Judgment, the Attorney Defendants make the exact same argument that they made in their third Motion to Dismiss: that petitions seeking increases in child support for the Perlbergers' minor child Laura and the alimony award for Messody Perlbergers are presently pending in the Montgomery County Court of Common Pleas. The Court squarely addressed this issue in Perlberger v. Perlberger, 1998 WL 472657, at *5 (E.D. Pa. Aug. 13, 1998) and determined that the proceedings in this action will not interfere with those state court proceedings. For the reasons set forth in the earlier ruling, the Court will not abstain from exercising its jurisdiction over this case. Therefore, the Court will deny the Attorney Defendants' Motion for Summary Judgment on this ground.

E. Res Judicata and Collateral Estoppel

In their first Motion to Dismiss, the Attorney Defendants

raised the argument that Plaintiffs' state law claims were barred under the doctrines of res judicata and collateral estoppel; the Court rejected this argument. Perlberger v. Perlberger, 1997 WL 597955, at *5-6 (E.D. Pa. Sept. 16, 1997). Because the Attorney Defendants have not provided any additional information in their current Motion that would cause the Court to change its earlier decision, the Court declines to revisit this issue. Therefore, the Attorney Defendants' Motion for Summary Judgment on this ground will be denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MESSODY T. PERLBERGER, etc.	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
NORMAN PERLBERGER, et al.	:	NO. 97-4105

O R D E R

AND NOW, this day of February, 1999, upon consideration of the Motion for Summary Judgment by Defendants Perlberger and Perlberger Law Associates (Doc. No. 132), Plaintiffs' Opposition (Doc. No. 166), and Defendants' Reply and Additional Memorandum (Doc. Nos. 168 and 199), **IT IS HEREBY ORDERED** that the Motion is **DENIED**.

BY THE COURT:

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John R. Padova, J.